No. 10,073.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN-KNAPP ENGINEERING CO. (a corporation),
Appellant,

vs.

O. T. GILBANK, Trustee of Estate of Jumbo Consolidated Mining Co. (a corporation), Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdictional Statement.

PLEADINGS AND FACTS:

On March 15, 1939, Jumbo Consolidated Mining Co., a Nevada corporation, filed with the District Court of the United States for the Southern District of California, Central Division, its petition under Chapter XI of the Bankruptcy Act. (Title 11, U. S. C. A., Sec. 202.) [Tr. pp. 1-12.]

On March 16, 1939, the said District Court made and entered its order approving said petition and referring the said matter generally to Hon. Samuel W. McNabb, one of the referees in bankruptcy of said court. [Tr. p. 13.]

On September 11, 1940, the said referee in bankruptcy to whom the aforesaid matter had been referred made an order adjudicating said Jumbo Consolidated Mining Co. a bankrupt, which order was duly filed September 17, 1940. [Tr. pp. 14-15.]

On November 28, 1940, the appellee filed with the referee in bankruptcy his "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien." [Tr. pp. 19-31.] Paragraph I of said petition was amended by stipulation filed February 19, 1941, alleging the appellee to be the party in interest in the place and stead of Hubert F. Laugharn. [Tr. pp. 45-46.] Upon said petition an order to show cause was issued naming the appellant herein as one of the respondents therein. [Tr. pp. 31-34.]

On December 13, 1940, and within the time allowed by law, appellant and the other respondent to said order to show cause filed their answer to the said petition [Tr. pp. 35-44] and joined issue on certain points which were thereupon raised by the pleadings hereinabove referred to.

Certain hearings were had on said order to show cause, as a result of which, on June 6, 1941, the referee made and filed his findings of fact, conclusions of law and order with respect to the said issues. [Tr. pp. 47-66.]

On June 22, 1941, and within the time allowed by law, appellant filed its "Petition for Review of Referee's Order Granting Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid

Lien" [Tr. pp. 68-74], which petition, together with the "Certificate by Referee to Judge" [Tr. pp. 74-101], was filed with the clerk of the said District Court August 22, 1941.

On December 29, 1941, the Hon. Paul J. McCormick, Judge of the said District Court, made and filed his "Order *in re* Review of Referee's Order, and Memo of Decision." [Tr. pp. 102-105.]

STATUTORY PROVISIONS:

The District Court had jurisdiction to make the said "Order *in re* Review of Referee's Order, and Memo of Decision" under the provisions of Section 39(c) of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 67c).

This court has jurisdiction by virtue of the provisions of Section 24(a) of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 47a) and General Order in Bankruptcy No. XXXVI.

Statement of the Case.

MANNER IN WHICH QUESTIONS HAVE BEEN RAISED:

This is an appeal from that portion of the order and judgment of the Honorable Paul J McCormick, Judge of the District Court of the United States for the Southern District of California, Central Division [Tr. pp. 102-105], made and filed in said District Court December 29, 1941, approving and adopting the findings of fact and conclusions of law, and confirming the order, of the referee in bankruptcy made and filed by him June 6, 1941, in so far as the same refers and applies to the personal property described as "Parcel Two." [Tr. pp. 62-63, 97-98.] The correctness of appellee's position with respect to Parcels One and Three are conceded. [Tr. p. 75.]

QUESTION INVOLVED:

Has appellant complied with the provisions of section 2980, Civil Code of California, with respect to the recording of its conditional sales contract so as to have a valid lien or interest in certain mining machinery and equipment therein described (Parcel Two) as against the appellee?

Specification of Errors Upon Which Appellant Relies.

Appellant specifies five errors in support of its appeal. The first four alleged errors (pars. a, b, c and d, respectively, appellant's opening brief, pp. 7-9) are based upon the proposition that the *evidence* presented to the referee was not sufficient to justify the findings of fact and conclusions of law and order of the referee.

The fifth alleged error (par. e, appellant's opening brief, p. 9) has to do with the question as to whether or not appellant has properly recorded its said contract of conditional sale in view of the provisions of sections 2980 and 2959a and 405 of the Civil Code of the State of California.

Summary of Argument.

I. The evidence presented to the referee fully supports the findings of fact, and justifies the conclusions of law and order, of the referee.

1. Referee's summary of evidence is presumed to be correct;

2. The judge must accept the findings of fact of the referee since appellant has not shown them to be clearly erroneous.

II. The conditional sales contract of appellant is void as to the lien or interest claimed by appellant in the machinery and equipment described as Parcel Two, because:

1. For the purpose of the recording laws, as expressed in Civil Code of California, sections 2980 and 2959a, the bankrupt resided in Los Angeles County at the time it executed the said contract; and

2. Appellant failed to record the said contract in Los Angeles County.

III. Recording statutes are remedial and should be liberally construed so as to attain the object intended by them.

IV. Appellant's authorities are not in point and are contrary to the decisions of this state.

(All emphasis herein ours unless otherwise noted.)

ARGUMENT.

I.

The Evidence Presented to the Referee Fully Supports the Findings of Fact, and Justifies the Conclusions of Law and Order, of the Referee.

1. Referee's Summary of Evidence Is Presumed To Be Correct.

Inasmuch as the appellant did not present to the District Court, and has not presented to this court, a transcript of any portion of the evidence presented to the referee, it was assumed by the said District Court, and it should be assumed by this court, that the summary of the evidence as set forth by the referee in his "Certificate by Referee to Judge" [Tr. pp. 79-84] is correct.

It is the duty of the referee, when a petition for review is filed, to compile the record and certify it, with a summary of the evidence, to the court. If any party is not satisfied with the contents of the record and summary of the referee, timely objections should be made and amendments proposed. (*In re Burntside Lodge,* 7 F. Supp. 785, 26 A. B. R. (N. S.) 59 (1934; D. C. Minn.); Vol. 8, *Rem. Bank.* 29.)

The referee's summary of the evidence should be assumed to be correct in the absence of affirmative proof of error, and of request for further certification. (*In re Louis,* ..... F. Supp. ....., 37 A. B. R. (N. S.) 79 (1938; D. C. Cal.).)

2. The Judge Must Accept the Findings of Fact of the Referee Since Appellant Has Not Shown Them To Be Clearly Erroneous.

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact *unless clearly erroneous.* The judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (*Gen. Orders in Bankruptcy No. XLVII.*)

By General Order XLVII (see 11 U. S. C. A. foll. Sec. 53) the judge is required to accept the referee's findings of fact unless clearly erroneous. When the judge reviews on the record, the presumption is that the findings of fact by the referee are correct. This is the usual presumption made by appellate courts. General Order XLVII, as applicable to petitions for review, merely states the rule recognized by all circuits prior to its promulgation. (*In re Byrd Coal Co.,* 83 F. (2d) 190, 31 A. B. R. (N. S.) 241 (1936; C. C. A. N. Y.).)

If the findings are incomplete, there is a presumption that the referee acted rightly. This is the general presumption in favor of the validity of the proceedings of a court. (*Cooper v. Dasher,* 290 U. S. 106, 78 L. Ed. 203, 54 S. Ct. 6, 23 A. B. R. (N. S.) 667 (1933); *In re Shea,* 126 F. 153, 11 A. B. R. 207 (1903; C. C. A. Mass).)

"If there was evidence to support findings contrary to those made by the court, it is not in the record before us, and the responsibility therefor rests with the appellant upon whom weighed the burden of presenting to this court a proper record." (*United States v. Foster,* 123 F. (2d) 32, 34.)

"As against a claimed lack of evidence, which lack does not appear from the record, we must indulge the presumption that the District Court correctly decided all issues before it which might depend upon the factual evidence. (*In re Silverstein* (C. C. A. 9th), 35 F. (2d) 497, 499, 15 A. B. R. (N. S.) 85.)

"Assignments of error which raise questions on the evidence when the evidence is not in the record call for affirmance, not dismissal." (Vol. 8, *Rem. on Bank.,* p. 104.)

"We bear in mind the fact that this case involves an order of the referee based upon a finding of fact as to *intention.* When confirmed by the District Court, such an order should not be set aside on anything less than a demonstration of plain mistake. Fruehauf Trailer Co. v. Bridge, 84 F. (2d) 660, 663 (C. C. A. 6th)." (*Johns-Manville Sales Corp.'s Petition,* 88 F. (2d) 520 (1937; C. C. A. Mich.) *Allen, C. J.*)

II.

The Conditional Sales Contract of Appellant Is Void as to the Lien or Interest Claimed by Appellant in the Machinery and Equipment Described as Parcel Two, Because:

1. For the Purpose of the Recording Laws, as Expressed in Civil Code of California, Sections 2980 and 2959a, the Bankrupt Resided in Los Angelus County at the Time it Executed the Said Contract; and

2. Appellant Failed to Record the Said Contract in Los Angeles County.

The said conditional sales contract was never recorded in Los Angeles County [findings of referee, Tr. p. 91] and it is conceded that appellee is within the class of persons described as "*bona fide* purchasers, encumbrancers, and those having no actual knowledge of the contract who become creditors of the buyer while said property is in the possession of the buyer."

Appellant admits that the said contract is void as to the lien or interest claimed by it in the machinery or equipment therein described if, at the time of the execution of said contract (May 23, 1938), the bankrupt resided in Los Angeles County, as the term is used in sections 2980 and 2959a, Civil Code of California.

The pertinent provisions of said section *2980, Civil Code,* are as follows:

> "Every conditional sales contract . . . of equipment and machinery used or to be used for mining purposes, must be . . . recorded within twenty

(20) days after its execution in the office of the recorder of the county *where the buyer . . . resides at the time he executes such contract . . .* and . . . in the county where the property is situated, otherwise, it shall be void as to the lien, or interest of the seller . . . against *bona fide* purchasers, encumbrancers, and those having no actual knowledge of the contract . . . who become creditors of the buyer . . . while said property is in the possession of any of the last-mentioned parties (the buyer) . . .

"Sections 2959a and 2965 of the Civil Code are hereby made applicable to the instruments required to be recorded by this section in the same manner as to mortgages of personal property."

Section *2959a of said Civil Code* provides as follows:

"Where the mortgagor of personal property or crops is a corporation or a partnership *the county of residence thereof* for the purpose of recording such mortgage *shall be deemed to be the county wherein such corporation or partnership has its principal place of business within this state.*"

The county wherein the bankrupt had its principal place of business within this state was Los Angeles County [Referee's Summary of Evidence, Tr. pp. 80-82; Findings of Referee, Tr. pp. 85-88], and, in accordance with the provisions of section 405 of the Civil Code of California, the bankrupt, on September 1, 1937, duly filed its statement in the office of the Secretary of State of the State of California stating that "the location and address of the principal office of said corporation within the State of California is Bay Cities Building, 225 Santa Monica Boulevard, in the City of Santa Monica, County of Los

Angeles, State of California", and that the name of the person residing in the state upon whom process directed to said corporation may be served is W. J. Shaw, giving his address, as provided by Civil Code section 405, to be in Los Angeles County. [Findings of Referee, Tr. p. 87.]

Therefore, it clearly appears that *for the purpose of the recording laws of this state,* as set forth in Civil Code of California, sections 2980 and 2959a, Los Angeles County was the place of residence of the bankrupt within this state and failure to file the said conditional sales contract in Los Angeles County rendered void the said contract as to the lien or interest claimed by appellant in the said mining machinery and equipment.

In arguing in support of appellee's position, it would be difficult to improve upon the language used by the Honorable Paul J. McCormick in his said order [Tr. pp. 103-105]:

> "We regard the question for decision as so clear under the record before us and under the laws of California which unquestionably control this matter that merely a brief statement in amplification of the foregoing order is sufficient.
>
> "The referee has summarized the evidence as to the residential locale of the corporation bankrupt at all times applicable to the inquiry before the court. It is unnecessary in this memorandum to restate the facts or to do more than state that with the exception of the initial legal processes of organizing the corporate body in the State of Nevada, *every substantial activity and function of the Jumbo Consolidated Mining Company has been carried on and performed within the State of California.*

"The question of residence is one of intent and the purpose of the bankrupt corporation relative to its commercial domicile while doing business in California has been definitely shown to have been at all times the County of Los Angeles.

"It is also significant and highly informative as to the corporation's expressed residential intent that in Paragraph Second of the articles of incorporation after providing that the principal office of the corporation in Nevada is in the City of Reno, it is stated 'but that this corporation may maintain an office or offices in such other place or places, within or without the State of Nevada, as may from time to time be designated by the board of directors or by the by-laws of this corporation, and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, outside of the State of Nevada, the same as though conducted within the State of Nevada.' This declaration even in the fundamental instrument creative of the corporate existence of the bankrupt company, followed by the indisputable location of the office of the corporation at Los Angeles County and other factors shown by the evidence and found by the referee, indicate that although formed in Nevada, the bankrupt corporation was for all practical and commercial purposes a California corporation which had its principal place of business in California in Los Angeles County.

"In the language of the Supreme Court of California in its decision in Wait v. Kern River Mining etc. Co., 157 Cal. 16, the bankrupt mining company now before this court 'is a foreign corporation only in the sense that it is created in another state and continues

to enjoy corporate life by permission of that state. In every other sense it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. *Under such circumstances its residence . . . anywhere else outside of California, is the merest fiction.'* See, also, late California Appellate Court decision in Sharp v. Big Jim Mines, 39 C. A. (2d) 435, to the same effect.

"It is true that neither of the two state court decisions pertain directly to the 'recording statutes' of California, such as sections 2980, 2959a or 2965 of the Civil Code of California. *We think, however, that the unaided language of these code sections when considered, as they must be in this matter involving a 'foreign corporation', with section 405 of the same code, undoubtedly make secure the correctness of the referee's order under attack."*

The case of *Wait v. Kern River Mining Co.* (157 Cal. 16), decided by Judge Angelotti December, 1909, was a case where the defendant corporation was organized and existing under the laws of Arizona *but all of its property was situate, and all of its business carried on*, in this state with its office in the City of Los Angeles. It was organized for the purpose of developing certain mining claims in Kern County. [This is precisely the same situation as shown in the summary of the evidence and found in the findings of fact of the Referee: Summary of Evidence, Tr. pp. 79-82; Findings of Referee, Tr. pp. 85-95.] On page 21, the court held:

"Defendant corporation was, as we have seen, organized under the laws of Arizona. *But for all practical purposes, according to the record, it is a*

California corporation. Its contemplated business was all to be transacted in this state, all of its property is here and it does business nowhere else. As was said by Judge Lurton of another corporation in Young v. South Tredeger Co., 85 Tenn. 189, (4 Am. St. Rep. 752, 2 S. W. 202), 'its whole tangible and ponderable substance is in this state.' It is a foreign corporation only in the sense that it is created in another state and continues to enjoy corporate life by permission of that state. In every other sense, it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. Under such circumstances *its residence in Arizona,* or anywhere else outside of California, *is the merest fiction.* As to such a corporation, so organized and situated in regard to all its business and property, we can see no good reason why, as was said in the case last cited, 'the fiction as to the situs of the corporation entity ought not to yield in the interest of justice to the actual facts,' to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the situs of its stock."

The more recent case, *Sharp v. Big Jim Mining et al.,* 39 Cal. App. (2d) 435, decided June 10, 1940, is one where an action was brought to enjoin the levy of an assessment upon stock of the defendant corporation and where the court was called upon to determine its jurisdic-

tion over that corporation in view of its being organized in Arizona. However, it was organized to do business in California; *its principal place of business was in Los Angeles where all of its books and records were kept;* that for years last past *all the business of the corporation had been conducted in California* where it was interested in two mining properties. The court held that the general rule that courts will not interfere with the internal affairs of a foreign corporation (p. 439):

> "whose foreignness is at best a metaphysical concept must fall before the practical necessities of the modern business world. In such cases the courts are inclined, in considering the questions of public policy and expediency to determine whether or not jurisdiction should be exercised, to look to the real, practical status of the corporation rather than its technical or mere nominal foreignness. Convenience, expediency and justice are to be determined, in part at least, by the location of the books, records, assets and the principal offices of the corporation, the place of residence of the directors and officers, and the place where its business is transacted."

Also, on page 440, the court referred with approval to the above case of *Wait v. Kern River Mining Company.* The court further stated (p. 440):

> "We therefore believe that it may safely be said that when a corporation is non-resident only in that it is the creation of another state—its officers, agents, books, place of business, business, and all its property

> being within the jurisdiction of the court—policy and expediency do not require the court to deny relief in a proper case on the ground that the internal affairs of the corporation will be affected."

As a matter of public policy there is all the more reason for this court to conclude that the Bankrupt has resided and has done business in the County of Los Angeles where the question involves the rights of creditors with regard to the recordation of liens and evidences of title.

For many practical purposes and the enforcement of internal rights, a foreign corporation may be considered a California or "resident" corporation. Thus one which holds directors' meetings in California and does most of its business here, even though organized in another state, is for some purposes deemed a resident, so that stockholders may obtain jurisdiction over the corporation and its officers for the purposes of enforcing their rights in the internal management, such, for instance, as a right to inspect mining property, though located in another state. *Hobbs v. Tom Reed etc. Co.,* 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781, in which the court held (p. 500):

> "The corporation holds its directors' meetings in this state, its directors reside here and the corporate business, in part, at least, is done here. *The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state.* (Wait v. Kern R. M. Co., 157 Cal. 21 (106 P. 98).)"

A similar situation was present in the case of *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516 (150 Pac. 643), in which the court held (p. 520):

> "In the case at bar the respondents, as directors of the corporation and charged with the performance of a duty to the stockholders, are all residents of this state, and as such board of directors they transact all the business of the corporation, not in Arizona, but in California. The resolution calling the election can be and, if passed at all, no doubt will be adopted at a meeting of the board held at its offices in Los Angeles, where it appears all its meetings have been held and all of the corporate acts other than that here involved have been performed. Since all of the members of the board of directors reside in this state, wherein all its property is situate and all its corporate business, including that of its board of directors, is transacted, *the corporation, although organized under the laws of Arizona, must be deemed a resident of this state and subject to the jurisdiction of the courts thereof.* . . . This view finds ample support in the following authorities: Hobbs v. Tom Reed G. M. Co., 164 Cal. 497, (43 L. R. A. (N. S.) 1112, 129 Pac. 781); Wait v. Kern River Mining etc. Co., 157 Cal. 16, (106 Pac. 98); Potomac Oil Co. v. Dye, 10 Cal. App. 534, (102 Pac. 677); 14 Cal. App. 674, (113 Pac. 126, 130)."

III.

Recording Statutes Are Remedial and Should Be Liberally Construed So as to Attain the Object Intended by Them.

". . . recording statutes are remedial and should be liberally construed *so as to attain the object intended by them.* The design of recording laws is to prevent fraud in transactions *by securing certainty and publicity in such dealings;* their whole object is to permit and require the public to act with the presumption that recorded instruments exist and are genuine; and they should not be construed to produce fraud, but so as to prevent it. The public policy upon which registration laws are founded favors an interpretation and construction which will encourage confidence in records rather than suspicion, doubt, or uncertainty." (53 *C. J.* 606.)

IV.

Appellant's Authorities Are Not in Point and Are Contrary to the Decisions of This State.

In spite of the controlling effect of the said decisions of this state, it may be well to point out the distinctions between the case at bar and the cases cited by appellant.

Matter of A & B Oil Co., 95 F. (2d) 946:

Appellant admits this case is not in point.

Babcock & Wilcox Co. v. Spaulding (1936, C. C. A. 1st), 86 F. (2d) 256):

Was a case wherein Babcock & Wilcox Co., and Cameron Machine Company, appellants, filed petitions for leave to repossess property sold to the debtor under conditional sales contract as against the trustee in bank-

ruptcy. The District Court refused to permit appellants to repossess the property under their conditional sales contract and they appealed and the Circuit Court affirmed the judgment of the District Court.

Cameron Machine Company was a New York corporation; the Babock & Wilcox Co. was a New Jersey corporation; the bankrupt was a Maine corporation having its principal office at Portland, Maine.

After its incorporation the bankrupt registered as a foreign corporation in New Hampshire "where it had mills of a substantial value". It does not appear whether or not the bankrupt had done, or was doing, business in Maine and for that reason had actually a business situs, or residence, in Maine, or whether, as in the case at bar, the bankrupt was organized in Maine solely for the purpose of doing business in New Hampshire, and had all of its corporate assets and books and records, and held all of its meetings, in New Hampshire.

In re Brown, 14 F. Supp. 251:

This is the decision of the district judge which was considered by the Circuit Court in the above case of Babcock & Wilcox Co. As appears from the decision of the District Court, the most that can be said as to the reason for incorporating in Maine, or with regard to the amount of business done in New Hampshire, is that "it did a large part of its manufacturing business in New Hampshire". (p. 253.) This is far from the finding that the bankrupt was incorporated in Maine solely for the purpose of doing business in New Hampshire, and that all of its business was carried on in New Hampshire. In fact, the point involved in the case at bar was not con-

sidered by either the District or the Circuit Courts and, of course, could not have been considered in view of the facts in those cases.

Whitney v. Browne, 180 Mass. 597, 62 N. E. 979:

This case appears not to be in point on any question involved herein.

Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773:

This was a case in equity receivership where The Thew Shovel Co. petitioned for the release of certain property in the hands of a receiver. Its petition for the release of the property was denied. The purchaser of the property under a conditional sales contract was the Southern Sand and Gravel Company and the said Thew Shovel Co. was the seller. The said purchaser was a Delaware corporation, doing business in North Carolina. Its chief business was mining and selling sand and gravel. It does not appear that the purchaser was organized in Delaware solely for the purpose of doing business, and that it was only doing business in the State of North Carolina. In other words, the distinctions between that case and the case at bar are similar to those of the *Babcock* case. Consequently, the main issue involved herein, and the main issue discussed in the *Wait* case (157 Cal. 16), *supra,* and the *Sharp* case (39 Cal. App. (2d) 435), *supra,* and the other cases cited by appellee is not discussed.

The court does say, however (p. 774) that the Legislature,

> "in C. C., Sec. 3311, designates the principal place of business of a domestic corporation as its residence for the purposes of this section, *but makes no refer-*

ence to a foreign corporation licensed to do business in this state, the reasonable inference is that the Legislature treated such corporations as non-residents."

Therefore, it appears that the law upon which that case was decided had to do only with domestic corporations.

Conclusion.

In view of the foregoing, it is respectfully submitted that the decision of the District Court appealed from should be affirmed.

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